

20 November 2018

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Dear Roger and Carly

Independent Planning and Legal Advice on the Manawatu-Whanganui Regional Council One Plan - Consenting Pathways for Dairy and Horticulture Activities

Please find **enclosed** the joint legal/planning opinion commissioned by you in September 2018 on the nitrogen leaching rules and consenting issues in the Manawatu-Whanganui Regional Council ("**Horizons**") One Plan ("**the Plan**").

As instructed our task was to determine whether or not there is a viable consenting pathway¹ for dairy and horticulture activities in the Manawatu-Whanganui Region ("**the Region**") in respect of nitrogen leachate maximums under the Plan. To assist in this task Ministry for the Environment ("**Ministry**") staff put together a series of questions to test the operation of the rules in the Plan. Our response to those questions and a detailed analysis of how the current provisions of the Plan operate (and hence the consenting hurdles) are included as **Appendices** to this advice, which is provided in three parts:

1. A joint legal and planning opinion setting out our overall evaluation and conclusions regarding the management of intensive farm land use for nitrogen leaching maximums (**Appendix A**);
2. The four specific questions asked by the Ministry in their request for services and a summary response to those questions (**Appendix B**); and
3. A summary of the planning assessment of consenting pathways for three farm scenarios where a consent would be required for land uses seeking to exceed the OVERSEER modelled nitrogen leaching maximums (**Appendix C**).

¹ Throughout this letter and opinion, the understanding of a 'consenting pathway' is that there is a clear process and suitable guidance by which to consider the appropriateness of a consent application, pursuant to the outcomes sought by the provisions of the Plan.

As discussed with you, this advice is a joint opinion from both of us and updates an interim opinion that was prepared for the purpose of a workshop with interested parties (held on 18 October 2018 in Wellington).

Summary of our conclusions

With respect to the three land use scenarios, our opinion is that the rules of the Plan appear to provide a consenting pathway for an existing intensive farm land use where the modelled nitrogen leachate maximums will exceed those specified in the Plan. However, the policies of the Plan significantly limit the circumstances in which Horizons is able to consider such an application. Specifically, we are of the opinion that there is insufficient policy scope for consideration to be given to the listed matters of discretion set out in the relevant rule. As such, we conclude that there are only limited (and potentially not practicable) circumstances where a consenting pathway would exist for a 'typical applicant' (e.g.: a single farm operation). Overall, while the rule regime implies opportunity for discretion, the policy regime of the Regional Plan does not appear to anticipate that applications can be granted where they do not "comply" with the nitrogen leaching maximums set in Table 14.2, irrespective of the potential environmental outcomes of such a proposal.

This consenting circumstance results largely from the wording of Regional Plan Policies 14-5 and 14-6. These policies provide direct guidance to processing planners on the matters to consider for an intensive farming land use consent. The policies are directive, and require compliance with the limits in Table 14.2, with specific and very limited exceptions that are, in our view, more appropriately structured as rule performance standards than as direction on resource management. In contrast to other policies that provide guidance on considering consent applications in the Plan (e.g. those related to discharges), they do not provide guidance on either the specific land use management practices that may be considered appropriate (beyond compliance with the rules for modelled nitrogen leaching maximums) to achieve the environmental outcomes sought, nor do they provide evidence to circumstances in which an activity that does not achieve the rules which are based on a modelled scenario may be considered 'appropriate' in the real world.

While non-compliance with the maximums in Table 14.2 is not denoted as a prohibited activity in the rules, and clearly the rule framework of the Regional Plan provides a lawful consenting pathway for applications, the policy direction for management in the Regional Plan policies provides almost no scope for the consideration of such activities, or for the specific land use management practices that may be considered appropriate to provide for the 'exception' that is otherwise provided for by the rules.

With respect to a way forward, the authors consider that in addition to the update proposed by the Council to the OVERSEER modelled nitrogen leaching maximums (as set out in Table 14.2), amendments are required to Regional Plan Policies 14-5 and 14-6, to assist applicants and processing planners on the specific management directions or outcomes being sought for the matters of discretion for the rules (e.g. Rule 14-2), and that these are best considered as a single plan change to the Plan given their interrelated nature.

Policy 5-8 of the higher order Regional Policy Statement ("**RPS**") provides direction on matters to be considered in the setting of nitrogen leaching maximums, including (amongst others) the following:

1. That the nitrogen leaching maximums are to be achievable on most farms using good management practices;
2. That appropriate timeframes for achievement of the nitrogen leaching maximums are provided where there would be large changes to management practices and/or high levels of investment for existing intensive farm activities required; and
3. That the strategies of the RPS for surface water and groundwater quality (defined in other policies of the RPS) are achieved.

On the basis of workshop discussions and feedback from all parties, we consider that there is at least still contention as to whether or not the nitrogen leachate maximums specified in Table 14-2 (which relate to **all** degraded catchments in the Region) have been set being cognisant of these different (and potentially competing) matters.

As such, while Policy 5-8 goes on to provide prescriptive direction for management of intensive farm land use activities (to 'achieve the nitrogen leaching maximums'), we do not consider the suite of provisions as currently drafted gives sufficient direction to deliver to the policy outcomes sought by the RPS.

In our opinion, amendment of Policies 14-5 and 14-6 could (in a manner similar to other policies of the Regional Plan such as Policies 14-1 and 14-2), provide specific direction or scope for consideration of the wider objectives and policies of Chapter 5 of the RPS. Without intending to draft such policy amendments, we consider that any such amendment might consider further policy guidance on:

1. What might be included in an assessment of the 'real world effects' of an application for intensive farming activities, with reference to the values identified in Schedule 8 of the RPS, and the strategies set in Policies of 5-2 through to 5-6, to assess the appropriateness of the extent of non-compliance with the modelled nitrogen leaching maximums;
2. The specific land use management practices that may be considered appropriate (e.g. what 'good farm management practices' look like) as measures to remedy and mitigate nutrient leaching;
3. The processes for changing farm management practices and systems to achieve an appropriate trajectory of improvements in nitrogen leaching maximums over time; and
4. The scope for consideration of other options, such as off-setting expected nitrogen leaching from an intensive farm operation with works or protection of other areas in the catchment, to achieve the strategies of the RPS and the values identified in Schedule B of the RPS.

Notwithstanding the above, in our view a key constraint to any consenting pathway remains the lack of catchment specific data by which an applicant can consider the potential effects of a single farm operation within the context of wider catchment dynamics. For clarity, from our discussions, the establishment of such information on a 'farm by farm' basis is not likely to be practicable.

Workshop on 18 October

As noted above, an interim opinion was provided to inform discussion at a workshop (18 October) between the 'relevant parties' (being Ministry for the Environment (host), Fish and Game, Horizons Horizons and the Environmental Defence Society (EDS)). From the discussion at the workshop, a number of amendments were made to the interim opinion to further clarify the intent of the opinion and to provide more specific direction in respect of the potential 'way forward'. The workshop did not result in any changes to the conclusions reached in our interim opinion, but did clarify a number of matters.

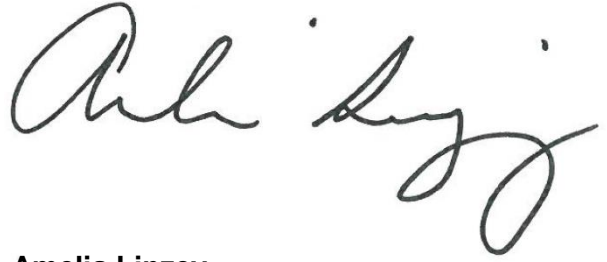
Yours sincerely
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APPENDIX A - Legal and Planning Opinion

1. Purpose

- 1.1 The Minister for the Environment has offered his support to the Manawatu-Wanganui Regional Council (“**Horizons**”), New Zealand Fish and Game Council (“**Fish and Game**”) and the Environmental Defence Society (“**EDS**”) in relation to an ongoing dispute about the operation of certain rules in the Horizons One Plan (“**the Plan**”) relating to fresh water management.
- 1.2 At least two of the parties to the dispute are agreed that some amendments to the Plan are required, but remain at odds as to the interpretation and operation of Rules 14-2 and 14-4 of the Plan, and therefore what further amendments to the Plan should be made, both to reflect an update to the OVERSEER model and to better enable the Plan to deliver the objectives of the Regional Policy Statement (“**RPS**”) and the Regional Plan.
- 1.3 You have asked us to provide an independent planning and legal opinion on whether or not the Plan offers a viable consenting pathway for dairy and horticulture activities in the Region. A ‘consenting pathway’ has been assumed to be the extent to which there is a clear process and suitable guidance by which to consider the appropriateness of a consent application, pursuant to the outcomes sought by the provisions of the Plan.
- 1.4 The particular issue is whether or not there is a lawful consenting pathway for dairy and horticulture activities that do not meet the cumulative nitrogen leaching maximum values contained in Table 14.2,² and if so, whether or not that pathway is feasible and practicable (from a consent process perspective).

2. Process to prepare this Advice

- 2.1 To inform our advice, we initially undertook a planning assessment of the Plan provisions, on the basis of the scenarios provided to us. This was followed by a review of all background documents provided to us on 9 September 2018 by the Ministry for the Environment (“**Ministry**”).³ Within these documents expert opinions and planning advice on consenting pathways have been provided. These have been reviewed.
- 2.2 We have also held separate discussions with each of the parties (and their experts and/or legal representatives) prior to preparing the interim advice and then a workshop discussion on the interim advice. Following the workshop, this opinion has been updated to respond to questions and matters raised by the parties. While a number of amendments have been made to the interim opinion, these were largely to further clarify the intent of the provisions and to provide more specific direction in respect of a potential ‘way forward’. The workshop did not result in any changes to the conclusions reached in our interim opinion.

3. Executive Summary

- 3.1 From a review of the three land use scenarios provided to us, our view is that while the rules of the Plan provide for a consenting pathway for an existing intensive farm land use where

² As proposed by Proposed Plan Change 2.

³ Letter from Horizons to Minister Parker regarding One Plan – Implementation of Intensive Land Use Policies (13 July 2018); Ministry for the Environment *Briefing to the Minister for the Environment - Update for Visit to Horizons Regional Council 21 June 2018* (18 June 2018); Letter from EDS to Minister Park regarding Manawatu-Wanganui ‘Horizons’ Regional Council One Plan Implementation (20 June 2018); Hill Young-Cooper *Section 35 Monitoring Report* (June 2018); Ministry for the Environment *Briefing to the Minister for the Environment - Update for Visit to Horizons Regional Council 14 March 2018* (12 March 2018); *Consenting Pathway meeting minutes* (11 December 2017); Gilliland B *Notes on the derivation of One Plan Table 14.2* (1 November 2017); Van Voorthuysen Environmental Limited *One Plan – Intensive Farming Land Use Activities* (June 2017); Enfocus *Planning Opinion on consenting pathways for intensive farming: Horizons One Plan* (Undated); Ministry for the Environment *Legal Memo: Implications of Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* (16 May 2017); *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37; Rebuttal Evidence on ENV-2016-WLG-000038, Peter Harold Taylor (Nutrient Management) for Fish and Game and EDS, 20 January 2017; Horizons Regional Council *Report No. 15-214 - One Plan Nutrient Management Provisions* (28 October 2015); Letter (and attachments) from S J Ongley to the Chief Executive of Horizons enclosing Application for Declarations by Wellington Fish and Game Council and EDS (19 September 2016); AgResearch *Farming within limits for productivity gains: an innovation system approach to improving extension delivery in Horizons RE8500/2015/031* (April 2015).

the modelled nitrogen leachate maximums will exceed those specified in the Plan, the policies of the Regional Plan part of the Plan significantly limit the circumstances where an exception to meeting the modelled limits can be assessed. As such, we conclude there are only limited (and potentially not practicable) circumstances where such a consenting pathway exists. Overall, the current policy regime of the Regional Plan does not seem to anticipate that applications be granted where the proposed activity does not “comply” with the nitrogen leaching maximums set in Table 14.2.

3.2 We have concluded that under the current provisions of the Plan, whilst there is a theoretical consenting pathway available for existing dairy and horticulture activities, where they do not meet the leaching maximums, this is not a viable “pathway” as, while the rule regime implies opportunity for discretion, the policy regime of the Regional Plan does not appear to anticipate that applications can be granted where they do not “comply” with the nitrogen leaching maximums set in Table 14.2, irrespective of the potential environmental outcomes of such a proposal. We further note:

- (a) Policy 5-8 of the RPS section of the Plan provides prescriptive direction for management of intensive farm land use activities (to ‘achieve the nitrogen leaching maximums’). It also provides an expectation for the setting of such maximums (amongst other things) to:
 - (i) Achieve the strategies of the RPS for surface water and groundwater quality (defined in other policies of the RPS);
 - (ii) Be achievable on most farms using good management practices; and
 - (iii) Provide appropriate timeframes for achievement of the nitrogen leaching maximums, where there would be large changes to management practices and/or high levels of investment for existing intensive farm activities.
- (b) Recent changes to the OVERSEER model outputs have resulted in an increase in farms that will not meet the nitrogen leaching maximums of Table 14-2 (in some catchments), to such an extent that it cannot be considered that under the existing OVERSEER model outputs these maximums will be achievable on ‘most’ farms using just good farm management practices. As such, Horizons proposes that the existing OVERSEER model be updated; and
- (c) The rule framework of the Regional Plan (Rule 14-2) provides for such activities to be considered, by way of land use consent applications. However, the Regional Plan Policies 14-5 and 14-6 are very directive and essentially significantly limit the circumstances whereby consent can be granted where modelled nitrogen leaching limits are not able to be achieved. Those policies are essentially worded like performance standards to rules, and direct that, even in cases where consent is being sought to exceed nitrogen leaching maximums, that these maximums must be met.

3.3 On the assumption that Horizons intends to update the OVERSEER model leaching maximums (Table 14-2) as a first step, we also assume that the intended approach to the Plan is to establish a management regime whereby all intensive farms within degraded catchments fall into a regulatory management process. This will allow for the progressive management of nitrogen leachate discharges, with the goal to improve surface water and ground water quality (rather than a potential process of dramatic changes in land use activities).

3.4 On this basis, we propose a way forward is for further amendments to Regional Plan Policies 14-5 and 14-6 as part of the plan change process to update the OVERSEER model. Without intending to draft such policy amendments, we consider further policy guidance in the Plan could be provided to assist processing planners on the following:

- (a) What might be included in an assessment of the 'real world effects' of a consent application for intensive farming activities, with reference to the strategies set in Policies 5-2 through to 5-6, and the values and management objectives identified in Schedule 8 of the RPS;
- (b) Site specific considerations to assist in assessing the appropriateness of the extent of non-compliance with the modelled nitrogen leaching maximums (e.g. given real world conditions);
- (c) The specific land use management practices that may be considered appropriate (e.g. what 'good farm management practices' look like) as measures to remedy and mitigate nutrient leaching;
- (d) The processes for changing farm management practices and systems to achieve an appropriate trajectory of improvements in nitrogen leaching maximums over time, acknowledging different intensive farm land use activities;
- (e) The scope for the consideration of other options, such as off-setting expected nitrogen leaching from an intensive farm operation with works or protection of other areas in the catchment, to achieve the strategies of the RPS and the values identified in Schedule B of the RPS; and
- (f) Consideration of the National Policy Statement on Fresh Water Management 2014, along with any attendant implications of the *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 decision.

4. **Answers to specific questions from the Ministry**

Question 1 - *Is there a practical consenting pathway for intensive land uses under rules 14.2 and 14.4 of the Horizons One Plan that do not meet the cumulative nitrogen leaching maximum (CNLM) values in Table 14.2 and that do not fall under the exceptions detailed in Policy 14-6?*

- 4.1 **Response to Question 1:** On the basis that a practical consenting pathway means that individual farms or intensive land uses will not be required to undertake or provide catchment wide modelling or measurement, we do not consider that there is a practical consenting pathway for intensive land uses under Rules 14-2 and 14-4 of the Plan, particularly in Scenarios 1A or 2. There may be (subject to information on farm management practices), a pathway for Scenario 1B, but this relies on a reading of the policies of the Plan 'in the round', including a broad consideration of Policy 5-8 and the potential 'gap' or deficiency between that Policy and Table 14-2 of the Plan. This wider policy consideration is necessary to identify the management direction that might provide appropriate direction by which to assess this application.

Question 2 - *Furthermore, please consider whether consents could be grated in the short and long term?*

- 4.2 **Response to Question 2:** Consideration has been given to the 'timeframe' factor and this has been determinative in the planning conclusions for Scenario 1B. A farm management practice change on a trajectory to achieve the CNLM values could be considered consistent with the provisions of the RPS and the Plan (if 'regard is had' to these objectives and policies – rather than the need to 'give effect' to the policies). However, this approach relies on reading the objectives and policies of the Plan (and RPS) in the round, rather than the more limited direction provided by Policies 14-5 and 14-6, which do not provide for such consideration. For clarity, we do not consider that the 'exception circumstances' provided in Policy 14-6(b)(ii) provide a circumstance relevant to this Scenario.

- 4.3 While discussed further in the full scenario assessment, it is noted here that the exception circumstances set out in Policy 14-6(b) effectively provides performance standard like conditions which are set as the exceptions that may be made to an exceedance of the nitrogen leaching maximums of Table 14-2. One of these relates to a physical environment condition, and the other to a time trajectory for compliance. It is our opinion that these circumstances would more appropriately be considered 'performance standards' to the rules, than policy directives, particularly as the first is a physical environment condition for the site (and will not be influenced by land use or resource management practices). In the case of the second subclause, it is our understanding that this condition is limited to four years from the date of the rules having effect (in the case of dairy farming activities from August 2010 and for vegetable growing, cropping, and intensive beef and sheep farming from May 2013), both of which have passed.

Question 3: - *How a consenting pathway could be provided for that is consistent with the broader One Plan.*

- 4.4 **Response to Question 3:** In respect of recommendations on how a consenting pathway could be provided for that is consistent with the broader Plan, we consider that there are a number of alternatives. On the basis that Horizons is considering a first step to amend Table 14-2, we consider that further amendment should be made to Policies 14-5 and 14-6 to provide clear management guidance by which to evaluate the appropriateness of an application against the 'matters for discretion' listed in Rule 14-2.
- 4.5 It is noted that an alternative approach to a more extensive review of the structure of the Plan, such as a comprehensive review of the methods to establish appropriate nitrogen leaching maximums across the Region's catchments (in accordance with Policy 5-8), would be another approach to establishing an appropriate consenting pathway. This matter would require specific technical advice and is beyond the scope and expertise of the authors providing this opinion.

Question 4: *Is a consenting pathway is available for the three case studies against the One Plan.*

- 4.6 **Response to Question 4:** In summary, while we conclude that consent can be applied for (for all three scenarios) there is limited scope for the decision maker to consider the environmental outcomes or the specific resource and land use management practices that may be considered appropriate under all three scenarios (Farm 1A, 1B and the Horticulture Site in Farm 2). In particular, under all scenarios, if assessment is limited to the matters in Policies 14-5 and 14-6, there is no clear consenting pathway (given the direction that applications must, except in the limited conditions set out in 4.5 above, meet the nitrogen leachate maximums). If, on the basis that there are inconsistencies and incomplete linkages between the policies of the Regional Plan, the provisions and the environmental outcomes being sought, an approach is taken that a wider assessment of the policies of the RPS and Plan is undertaken (having regard to the full suite of Plan provisions) along with reference to Part 2 of the Resource Management Act 1991 ("**RMA**"), it is our opinion that there may be some scope for Scenario Farm 1B to be considered for consent (on the basis of information being provided that demonstrates that there is a planned trajectory for land use practice to achieve the nitrogen leachate maximums).
- 4.7 Farm 1A and Horticulture Site 2 requires consent pursuant to Rule 14-2 as an intensive farming land use which exceeds the cumulative nitrogen leaching maximums. Assessment against the relevant objectives and policies of the RPS and the Regional Plan demonstrates that, without evidence to the contrary, the proposals will not be likely to achieve the Plan's outcomes. On the basis of the above, we consider further information to support the consideration of such an application would either need to be a robust demonstration of why the proposed nitrogen leachate will not have adverse effects (which itself is likely to rely on catchment-wide information and is not considered 'practicable' for most individual farm

consent applications), or without unquantified changes to the land use (effectively to achieve the Plan leachate maximums (e.g.: reducing stock loading, planting or retiring vulnerable land, using feed pads, or other mechanisms)), we consider that a consent for Farm 1A and Horticulture Site 2 would likely be declined. We reiterate this conclusion is not reached on the basis of the 'effects of nitrogen leaching from a land use activity' but rather taking a precautionary approach that, without sufficient catchment-wide information to conclude otherwise, the Plan directs that reliance is placed on the modelled nitrogen leaching maximums being met and that there is limited direction provided on the circumstances where exceptions or real world environment outcomes may be considered as an alternative.

- 4.8 In contrast, and pursuant to the overall objectives and policies of the Plan, we consider that there may be a scenario where the changing farm management practices of Farm 1B mean that there is sufficient site-specific evidence to suggest that this is an appropriate and sustainable management response. In particular, this is based on the modelling information which indicates that farm management practices are on a planned trajectory to achieve compliance with the leachate maximums set out in the Plan over the longer term. In this case, the consideration of 'practicable' is that such an application would rely on information on the processes of on-site / land use management that will achieve the Table 14-2 nitrogen leaching maximums in the longer term. It is anticipated that any consent for this activity would likely rely on appropriate conditions of consent requiring that this planned trajectory of farm management change be implemented.

5. Background

- 5.1 There have been a range of ongoing differences between the parties with regard to the Plan's approach to fresh water management since its conception. Table 14.2 and the related rules were the result of a lengthy appeals process in the Environment Court.
- 5.2 Most recently, Fish and Game and EDS successfully challenged the validity of some of Horizons' consenting actions by way of declaration proceedings in the Environment Court.⁴ The Court found that consents for intensive farming activities were granted by Horizons in a manner that was inconsistent with the Plan.
- 5.3 The nitrogen management provisions of the Plan rely on the nutrient modelling software, OVERSEER, and an updated version of this software was released earlier this year (noting that updates to this software are a regular process and as such, changes to any limits from the model are anticipated in the future). Following workshop discussions with the parties, we understand that:
- (a) The more recent update means that the specified nitrogen leachate maximums referred to in Table 14.2 for some catchments are no longer appropriate.
 - (b) However, for other catchments it appears that the existing leachate maximums may still be appropriate.
 - (c) It is our understanding that Horizons intends to update the Table 14-2 to provide an increase to the nitrogen leachate maximums, particularly in earlier years. This would increase the leaching maximums for all catchments (for existing intensive farming for all degraded catchments set out in Table 14-1).

⁴ *Wellington Fish and Game Council v Manawatu-Wanganui Regional Council* [2017] NZEnvC 37.

- (d) However, even if the Plan is changed to include the latest OVERSEER figures, the Region will still be faced with a situation where 'some' (potentially in excess of 100) farms would still require a Restricted Discretionary consent for the land use activity.⁵

5.4 We understand that Horizons is considering two key changes to the Plan by way of plan changes:

- (a) The first being amendments to the rules to amend the limits in accordance with revised outputs from the OVERSEER model; and
- (b) A second more substantive change to address the issue of an appropriate consenting pathway in instances where maximum leaching limit targets from the rules cannot be met.

5.5 While there appears to be a broad acceptance that Table 14.2 needs to be updated to reflect changes to OVERSEER (albeit potentially only for some catchments), the experts consulted by each side disagree about the operation of the rules and the limits in the Table. More specifically, there is disagreement as to whether or not changes are needed to the Plan provisions to create viable consenting pathways for dairy and horticulture activities.

6. **Overview of Jurisprudence of the Interpretation of Planning Instruments and the Assessment of Resource Consent Applications**

6.1 The following legal principles are pertinent to how the provisions of the Plan should be applied:

- (a) The meaning of provisions within the RMA and the Plan must ascertain from its text and in light of its purpose.⁶
- (b) Regional and district plan rules have the effect of Regulations.⁷ In that regard, the principles of statutory interpretation are applicable to both the RMA and the Plan.⁸
- (c) Regional and District Plans can contain rules that directly bind the public through sections 9-15 of the RMA. The rules must achieve the objectives and policies of the Plan.⁹ The purpose of a rule is to be found in the associated objectives and policies of the Plan which establish the environmental outcomes sought and the management direction for achieving that outcome.¹⁰

6.2 The plain meaning of the rule should be considered, while also having regard to the immediate context (objectives and policies) of the Plan.¹¹ An interpretation of a plan rule that avoids absurdity and practical administration should be preferred.¹²

6.3 Section 67(3) of the RMA states that a Regional Plan must give effect to any national policy statement ("**NPS**"), any NZCPS, any national planning standard and any regional policy statement. The Supreme Court in *King Salmon* said that to 'give effect' means to implement, and that this is a 'firm obligation'.¹³ In the present situation it is noted that the National Policy

⁵ It is noted that the specific number of farms where consent may be required is uncertain, particularly given that there are a number of land use activities operating with a land use consent to exceed the nitrogen leachate maximums granted by Council from earlier application of the Plan (through a consenting process that has subsequently been found to be contrary to the Plan provisions).

⁶ Section 5(1), Interpretation Act 1999; *Powell v Dunedin City Council* [2005] NZRMA 174 (CA) at [35].

⁷ Section 76(2) RMA.

⁸ *Powell v Dunedin City Council* at [33].

⁹ Section 68 and 76 RMA.

¹⁰ Applying *Beach Road Preservation Society Inc v Whangarei District Council* [2001] NZRMA 176 and *NZ Building and Projects Ltd v Auckland Council* [2017] NZEnvC 175.

¹¹ *Powell v Dunedin City Council* at [35].

¹² *Nanden v Wellington City Council* [2000] NZRMA 562 (HC) at [48].

¹³ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*].

Statement for Freshwater Management (“the NPS-FM”) will need to be given effect to as part of any plan review as the NPS-FM was not an operative NPS at the time the Plan was promulgated, and, as noted in the High Court decision *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492, is not implemented in the current provisions of the Plan.

- 6.4 Applications for consent are assessed pursuant to section 104 of the RMA. In making this assessment under section 104 of the RMA, Horizons must have regard to, *inter alia*, any relevant provisions of a regional policy statement or a plan. That is, the objectives and policies of the RPS and the Plan are relevant matters to be considered in any assessment of an application for consent.
- 6.5 In relation to decisions on Controlled activities, section 104A of the RMA specifically provides Horizons with the ability to impose conditions on an application for resource consent under section 108 only for those matters over which it has reserved control in its plan or proposed plan.
- 6.6 In relation to decisions on Restricted Discretionary activities, section 104C specifically provides that restricted discretionary activities may or may not be granted consent, with the discretion (and any attendant conditions) restricted to the matters specified in the relevant plan and in national standards regulations.
- 6.7 Finally, section 87A(6) provides that no person may apply for consent for something that is a Prohibited activity. If one were to apply, consent must not be granted.
- 6.8 Following the Court of Appeal decision *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, regard must also be had to Part 2 of the RMA when considering applications for consent, although the extent to which Part 2 has a bearing on the consideration of an application depends on the nature and content of the statutory instruments in question. That is, recourse to Part 2 should not render ineffective the provisions of the relevant planning instruments. In that regard, the Court of Appeal decision does not support a strict application of the *King Salmon* decision whereby regard to Part 2 is delimited to situations where there is uncertainty or incompleteness in the relevant planning instruments.

7. **Analysis of the fresh water provisions of the Horizons One Plan**

Regional Policy Statement

- 7.1 Chapter 5 of the Plan sets out the RPS provisions relevant for fresh water management in the Region. The Plan describes the resource management issue with regard to fresh water management for dairy and horticulture activities in the Region in the following terms:¹⁴

There has been a substantial intensification within the agricultural sector in recent years. This has contributed to a vibrant and booming regional economy but has also increased pressure on the Region’s water resources. There has been a significant increase in irrigation demand and the amount of nutrients leaching to surface water and groundwater. Although the impacts of agricultural intensification are less obvious than those caused by the major point source discharges.

- 7.2 Provision 5.2 includes “Issue 5-1: Water Quality” as a Significant Resource Management Issue. This provides:¹⁵

¹⁴ RPS, Chapter 5 - Water, 5.1.2 Overview, 5-2.

¹⁵ RPS, Chapter 5 - Water, 5.2 Significant Resource Management Issues, 5-6.

The quality of many rivers and lakes in the Region has declined to the point that ecological values are compromised and contact recreation such as swimming is considered unsafe. The principal causes of this degradation are:

- (a) nutrient enrichment caused by run-off and leaching from agricultural land, discharges of treated wastewater, and septic tanks
- (b) high turbidity and sediment loads caused by land erosion, river channel erosion, run-off from agricultural land and discharges of stormwater
- (c) pathogens from agricultural run-off, urban run-off, discharges of sewage, direct stock access to water bodies and their beds and discharges of agricultural and industrial waste*.

Shallow groundwater in areas of intensive land use in the Horowhenua and Tararua Districts has elevated nitrate levels in excess of the New Zealand drinking water standard. However, the quality of groundwater in the Region is generally suitable for stock needs and irrigation, and there has been no evidence of deteriorating groundwater quality during the past 15 years.

7.3 Provision 5.3 sets out the following relevant objectives or environmental outcomes the Plan seeks in responding to the above issue:¹⁶

Objective 5-1: Water[^] management Values

Surface *water bodies[^]* and their *beds[^]* are managed in a manner which safe guards their life supporting capacity and recognises and provides for the Values in Schedule B.

[footnotes omitted]

Objective 5-2: Water[^] quality

- (a) Surface *water[^]* quality is managed to ensure that:
 - (i) *water[^]* quality is maintained in those *rivers[^]* and *lakes[^]* where the existing *water[^]* quality is at a level sufficient to support the Values in Schedule B
 - (ii) *water[^]* quality is enhanced in those *rivers[^]* and *lakes[^]* where the existing *water[^]* quality is not at a level sufficient to support the Values in Schedule B
 - (iii) accelerated eutrophication and sedimentation of *lakes[^]* in the Region is prevented or minimised
 - (iv) the special values of *rivers[^]* protected by *water conservation orders[^]* are maintained.
- (b) Groundwater quality is managed to ensure that existing groundwater quality is maintained or where it is degraded/over allocated as a result of human activity, groundwater quality is enhanced.

For both objectives the directive is to ‘manage’ water quality. Furthermore, the objectives recognise that there are areas where this can appropriately be achieved by ‘maintaining’ water quality in some instances but enhancing water quality in other areas (where the current quality is such that it does not support identified values).

7.4 Provision 5.4 includes the RPS policy framework for water management in the Region:¹⁷

Policy 5-1: Water Management Zones* and Values

¹⁶ RPS, Chapter 5 - Water, 5.3 Objectives, 5-7.

¹⁷ RPS, Chapter 5 - Water, 5.4 Policies, 5.4.1 Water Management Framework, 5-10.

For the purposes of managing *water*[^] quality, *water*[^] quantity, and activities in the *beds*[^] of *rivers*[^] and *lakes*[^], the catchments in the Region have been divided into *Water Management Zones*^{*} and *Water Management Sub-zones*^{*} in Schedule A.2 Groundwater has been divided into *Groundwater Management Zones*^{*} in Schedule D.3.

The *rivers*[^] and *lakes*[^] and their *beds*[^] must be managed in a manner which safeguards their life supporting capacity and recognises and provides for the Schedule B Values when decisions are made on avoiding, remedying or mitigating the adverse *effects*[^] of activities or in relation to any other function under the Resource Management Act 1991 exercised by the Regional Council or Territorial Authorities. The individual Values and their associated management objectives are set out in the Schedule B Surface *Water*[^] Management Values Key and repeated in Table 5.2.

- 7.5 Policies 5-2 through to Policy 5-5 provide management direction on achieving the objectives of the Plan in respect of surface water quality. These policies provide for the setting of targets (Policy 5-2), compliance with targets (Policy 5-3), water quality enhancement in areas where targets are not met (Policy 5-4) and management direction where the water quality is not known (Policy 5-5). Policy 5-6 provides management direction for the maintenance of groundwater quality (similarly seeking to enhance such quality in circumstances where groundwater quality is degraded/over allocated).
- 7.6 This suite of policies provides a strategy for managing surface water and groundwater quality. This strategy recognises that the management of surface water quality will be achieved through the setting of water quality targets, which will inform the management of surface water quality. The Policies also recognise and provide for cases where the management regime will in some cases seek to 'maintain' surface water quality (Policy 5-3) and in others 'enhance' (Policy 5-4). The Policies also provide for managing effects in the case of uncertainty (Policy 5-5), and for management to 'either maintain or enhance' existing water quality on the basis of likely effects. In the case of groundwater, Policy 5-6 similarly seeks to enhance such quality in circumstances where groundwater quality is degraded or over allocated.
- 7.7 With respect to the RPS policies relevant to discharges and land use activities which affect water quality, the Plan provides:¹⁸

Policy 5-7: *Land*[^] use activities affecting groundwater and surface *water*[^] quality

The management of *land*[^] use activities affecting groundwater and surface *water*[^] must give effect to the strategy for surface *water*[^] quality set out in Policies 5-2, 5-3, 5-4 and 5-5, and the strategy for groundwater quality in Policy 5-6, by managing diffuse *discharges*[^] of contaminants in the following manner:

- (a) identifying in the regional plan targeted *Water Management Sub-zones*^{*}. Targeted *Water Management Sub-zones*^{*} are those subzones where, collectively, *land*[^] use activities are significant contributors to elevated contaminant levels in groundwater or surface *water*[^]
- (b) identifying in the regional plan intensive farming *land*[^] use activities. Intensive farming *land*[^] use activities are rural *land*[^] use activities that (either individually or collectively) make a significant contribution to elevated contaminant levels in the targeted *Water Management Sub-zones*^{*} identified in (a) above
- (c) actively managing the intensive farming *land*[^] use activities identified in (b) including through regulation in the regional plan, in the manner specified in Policy 5-8
- (d) the Regional Council must continue to monitor ground and surface *water*[^] quality in *Water Management Sub-zones*^{*} not identified in (a) and rural *land*[^] uses not identified in (b). Where monitoring shows the thresholds in (a) and (b) are met then the regional

¹⁸ RPS, Chapter 5 - Water, 5.4 Policies, 5.4.2 Water Quality, 5.4.2.3 Discharges and Land use Activities Affecting Water Quality, 5-13.

plan must be amended so that those further *Water Management Sub-zones** and rural *land^* uses are included in the management regime set out in (c).

- 7.8 This Policy requires the provisions of the Regional Plan to actively “manage” intensive farming land use activities in the manner specified in Policy 5-8, particularly in ‘target’ catchments, where land use activities are considered to be significant contributors to contaminant levels in groundwater or surface water.

Policy 5-8: Regulation of intensive farming *land^* use activities affecting groundwater and surface *water^* quality

(a) **Nutrients**

- (i) Nitrogen leaching maximums must be established in the regional plan which:
 - (A) take into account all the non-point sources of nitrogen in the catchment
 - (B) will achieve the strategies for surface *water^* quality set out in Policies 5-2, 5-3, 5-4 and 5-5, and the strategy for groundwater quality in Policy 5-6
 - (C) recognise the productive capability of *land^* in the *Water Management Sub-zone**
 - (D) are achievable on most farms using good management practices
 - (E) provide for appropriate timeframes for achievement where large changes to management practices or high levels of investment are required to achieve the nitrogen leaching maximums.
- (ii) Existing intensive farming *land^* use activities must be regulated in targeted *Water Management Sub-zones** to achieve the nitrogen leaching maximums specified in (i).
- (iii) New intensive farming *land^* use activities must be regulated throughout the Region to achieve the nitrogen leaching maximums specified in (i).

- 7.9 Of particular note for subsequent discussion is Policy 5-8(a)(i)(D) and (E) which state that nitrogen leaching maximums must be established in the Regional Plan, but qualifies this by saying “*which are achievable on most farms*” (emphasis added) and that appropriate timeframes for achievement should be provided where there would be large changes to management practices or high levels of investment for such activities required in order to achieve the nitrogen leaching maximums. Indeed, the reference to “most farms” implies that the standards and attendant rule framework should factor in the ability of the farmers to meet the standards (assuming good management practices), rather than solely the extent and nature of the adverse effects that are being experienced (which are provided by subclause (B) in particular). This Policy also refers to the management strategy Policies (5-2 through to 5-6), which in turn refer to the individual values and management objectives of catchments provided in Schedule B of the RPS.

- 7.10 It is noted that Policy 5-8 does not provide clear guidance on the balance between these considerations, but it is noteworthy that the Policy suggests that the consenting of dairy and horticulture activities which do not meet the standards, but that are working towards improved management practices which will (over time) result in achieving these standards, is anticipated and that the establishment targets in the Plan should recognise this process. However, in our view, the Policy anticipates that the above matters and considerations will be considered at the time of setting nitrogen leaching maximums.

- 7.11 We understand that there are diverse physical (particularly rainfall) characteristics of catchments in the Region. Furthermore, Schedule B provides direction on specific values associated with specific catchments and bodies of water (including sections of rivers) across the Region. These features are identified for different values and management objectives for

surface water (Part B.3 of that Schedule). These have in turn set Water Quality Targets (Schedule E), which vary (we assume to reflect the values identified). While beyond our expertise, we note that the complexity of the considerations of the variable targets set (Schedule E) and the other matters that need to be taken into account in setting the nitrogen leaching maximums **do not appear** evident in Table 14-2 (which is effectively the Regional Plan outcome of implementing Policy 5-8).

Regional Plan - Rules

7.12 Table 14.2 sets out the Cumulative nitrogen leaching maximum (“**CNLM**”) for the land used for intensive farming within each of the specified Land Use Capability (“**LUC**”) class in the Targeted Water Management Sub-Zones (which are defined in Table 14.1). This is calculated on a per hectare per year basis for the total area of the farm:¹⁹

Table 14.2 Cumulative nitrogen leaching maximum* by Land Use Capability Class*

Period (from the year that the rule has legal effect)	LUC* I	LUC* II	LUC* III	LUC* IV	LUC* V	LUC* VI	LUC* VII	LUC* VIII
Year 1	30	27	24	18	16	15	8	2
Year 5	27	25	21	16	13	10	6	2
Year 10	26	22	19	14	13	10	6	2
Year 20	25	21	18	13	12	10	6	2

7.13 Proposed Plan Change 2 (Recalibration of Nitrogen Leaching Numbers) seeks to amend Table 14.2 to account for an update to the OVERSEER model to version 6.3.0 as follows:²⁰

Period (from the year that the rule has legal effect)	LUC* I	LUC* II	LUC* III	LUC* IV	LUC* V	LUC* VI	LUC* VII	LUC* VIII
Year 1	30 51	27 45	24 40	18 29	16 25	15 24	8 11	2 3
Year 5	27 46	25 40	21 35	16 25	13 22	10 19	6 8	2 3
Year 10	26 44	22 37	19 32	14 23	13 20	10 17	6 8	2 3
Year 20	25 43	21 35	18 30	13 21	12 19	10 16	6 8	2 3

7.14 Under Rule 14-1,²¹ the use of land for the following types of intensive farming (dairy farming, commercial vegetable growing, cropping and intensive sheep and beef farming) that have a

¹⁹ Regional Plan, Chapter 14 - Discharges to Land and Water, 14.3 Rules – Agricultural Activities, 14-8.

²⁰ It is these revised figures that have been used in the planning scenario assessment.

²¹ Regional Plan, Chapter 14 - Discharges to Land and Water, 14.3 Rules – Agricultural Activities, 14-8.

nutrient management plan that demonstrates (amongst other things²²) that the nitrogen leaching loss from the activity will not exceed the CNLM specified in Table 14.2, is a Controlled activity.

- 7.15 Interestingly, control is reserved over (b) “compliance with the CNLM specified in Table 14.2”. This appears incongruous with the activity standard, as it requires that the CNLM specified in Table 14.2 are met in order to fall to be considered as a Controlled activity under this Rule.
- 7.16 Rule 14-2²³ deals with the use of land for intensive farming that cannot comply with the CNLM specified in Table 14.2. Such an activity is assessed as a Restricted Discretionary activity. On this basis, there appears to be a lawful consenting pathway for existing intensive farming land use which does not comply with the maximums in Table 14.2. Indeed, one of the matters that discretion is restricted to is “(b) *the extent of non-compliance with the cumulative nitrogen leaching maximum specified in Table 14.2*”, which in itself anticipates that consent can be applied for and granted for a proposal that does not comply with Table 14.2. Presumably, the less the non-compliance per hectare per year, the less the potential adverse effects that might arise and therefore the greater the likelihood that consent will be granted (or alternatively that there may be a mechanism to consider the scale of compliance relative to the values identified for a receiving catchment). Similarly, and drawing from the directives of Policy 5-8(a)(i)(E), a context of the scale or timeframe by which a land use activity can demonstrate a ‘trajectory of management to achieve compliance to the OVERSEER limits’ could also be a potential consideration of the ‘extent’ of non-compliance.
- 7.17 Further, turning to the relevant objectives and policies when making a decision on an application (which is a requirement of Policy 14-1, although not a requirement of a rule *per se*), Objective 14-1 requires that where a discharge is onto or into land, that such a discharge will avoid, remedy or mitigate adverse effects on surface water or ground water. The language used in this Objective provides choice, in the sense that avoidance is not a requirement, and activities which seek to remedy or mitigate adverse effects are acceptable.

Wider Policy Considerations

- 7.18 Policy 14-1 relates explicitly to the making of decisions on applications in respect of applications for discharges to water. It provides:²⁴

Policy 14-1: Consent decision-making for *discharges*[^] to *water*[^]

When making decisions on *resource consent*[^] applications, and setting consent *conditions*[^], for *discharges*[^] of *water*[^] or *contaminants*[^] into *water*[^], the Regional Council must specifically consider:

- (a) the objectives and Policies 5-1 to 5-5 and 5-9 of Chapter 5,
and have regard to:
- (b) avoiding *discharges*[^] which contain any persistent *contaminants*[^] that are likely to accumulate in a *water body*[^] or its *bed*[^],
- (c) the appropriateness of adopting the *best practicable option*[^] to prevent or minimise adverse *effects*[^] in circumstances where:
- (i) it is difficult to establish *discharge*[^] parameters for a particular *discharge*[^] that give effect to the management approaches for *water*[^] quality and *discharges*[^] set out in Chapter 5, or

²² Other matters or conditions of Rule 14-1 include: that there is a nutrient management plan and activities are undertaken in accordance with it, that cattle is excluded from wetlands and river beds (including bridging or culverting of watercourses of a width greater than 1m), and matters relating to air discharges.

²³ Regional Plan, Chapter 14 - Discharges to Land and Water, 14.3 Rules – Agricultural Activities, 14-10.

²⁴ Regional Plan, Chapter 14 - Discharges to Land and Water, 14.2 Policies, 14-1

- (ii) the potential adverse *effects* are likely to be minor, and the costs associated with adopting the *best practicable option* are small in comparison to the costs of investigating the likely *effects* on *land* and *water*, and
- (d) the objectives and policies of Chapters 2, 3, 6, 9 and 12 to the extent that they are relevant to the *discharge*.

7.19 As such, consideration only is to be had to the objectives and policies in Chapter 5. Further, regard is to be had to avoiding discharges. It is important to note, however, that this is not a requirement to avoid these discharges, but simply to have regard to doing so when making a decision on such an application.

7.20 Policy 14-2 relates explicitly to the making of decisions on applications, and provides:²⁵

Policy 14-2: Consent decision-making for *discharges* to *land*

When making decisions on *resource consent* applications, and setting consent *conditions*, for *discharges* of *contaminants* onto or into *land* the Regional Council must have regard to:

- (a) the objectives and policies of Chapter 5 regarding the management of groundwater quality and *discharges*,
- (b) where the *discharge* may enter surface *water* or have an adverse *effect* on surface *water* quality, the degree of compliance with the approach for managing surface *water* quality set out in Chapter 5,
- (c) avoiding as far as reasonably practicable any adverse *effects* on any sensitive receiving *environment* or potentially incompatible *land* uses, in particular any residential buildings, educational facilities, churches, marae, public areas, *infrastructure* and other physical resources of regional or national importance identified in Policy 3-1, *wetlands*, surface *water bodies* and the *coastal marine area*,
- (d) the appropriateness of adopting the *best practicable option* to prevent or minimise adverse *effects* in circumstances where:
 - (i) it is difficult to establish *discharge* parameters for a particular *discharge* that give effect to the management approaches for *water* quality and *discharges* set out in Chapter 5,
 - (ii) the potential adverse *effects* are likely to be minor, and the costs associated with adopting the *best practicable option* are small in comparison to the costs of investigating the likely *effects* on *land* and *water*,
- (e) avoiding *discharges* which contain any persistent *contaminants* that are likely to accumulate in the soil or groundwater, and
- (f) the objectives and policies of Chapters 2, 3, 6, 9 and 12 to the extent that they are relevant to the *discharge*.

7.21 In that regard, the following observations are made:

- (a) Where a discharge may enter surface water, Policy 14-2(b) requires that regard be had to the “*degree of compliance*” with the approach for managing surface water quality as set out in Chapter 5;
- (b) Policy 14-2(c) requires that regard be had to “*avoiding as far as reasonably practicable any adverse effects on any sensitive receiving environment or potentially incompatible land uses*”. That is, this Policy requires that regard be had to avoiding adverse effects (as far as reasonably practicable), but it does not require avoidance; and

²⁵ Regional Plan, Chapter 14 - Discharges to Land and Water, 14.2 Policies, 14-2.

- (c) Policy 14-2(e) similarly requires that regard be had to “*avoiding discharges which contain any persistent contaminants*”, again requiring that regard be had to avoiding adverse effects, but not to avoiding such discharges altogether.

7.22 Policy 14-3 imposes obligations on Horizons and does not govern the assessment of resource consent applications.

7.23 Policy 14-4 states that when applying for consents and making a decision on consent applications for discharges of contaminants into water or onto or into land, the opportunity to utilise alternative discharge options, or a mix of discharge regimes, for the purpose of mitigating adverse effects (applying the best practicable option) must be considered, and includes, but is not limited to, the following methods:

- (a) Discharging contaminants onto or into land as an alternative to discharging contaminants into water;
- (b) Withholding from discharging contaminants into surface water at times of low flow; and
- (c) Adopting different treatment and discharge options for different receiving environments or at different times (including different flow regimes or levels in surface water bodies).

Policy for Management of Intensive Farm Land Use

7.24 Policy 14-5 provides guidance on the management of land use, specifically intensive farming land uses. This Policy states that, in order to give effect to Policies 5-7 and 5-8 of the RPS, existing intensive farming of land must be managed to ensure that the leaching of nitrogen from those land uses does not exceed the CNLM values for each year contained in Table 14.2, unless the circumstances and Policy 14-6 apply. With respect to new intensive farming land uses, Policy 14-5(e) again states that such intensive farming land uses must be managed to ensure that the leaching of nitrogen from those land uses does not exceed the CNLM values for each year contained in Table 14.2.

7.25 Policy 14-6 governs the process of making decisions on the resource consent applications for intensive farming land uses, and the setting of consent conditions, for intensive farming land uses. That Policy provides:

Policy 14-6: Resource consent decision-making for intensive farming *land*[^] uses

When making decisions on *resource consent*[^] applications, and setting consent *conditions*[^], for intensive farming *land*[^] uses the Regional Council must:

- (a) Ensure the nitrogen leaching from the land is managed in accordance with Policy 14-5.
- (b) An exception may be made to (a) for existing intensive farming *land*[^] uses in the following circumstances:
 - (i) where the existing intensive farming *land*[^] use occurs on land that has 50% or higher of LUC Classes IV to VIII and has an average annual rainfall of 1500 mm or greater; or
 - (ii) where the existing intensive farming *land*[^] use cannot meet year 1 *cumulative nitrogen leaching maximums*^{*} in year 1, they shall be managed through conditions on their resource consent to ensure year 1 *cumulative nitrogen leaching maximums*^{*} are met within 4 years.
- (c) Where an exception is made to the *cumulative nitrogen leaching maximum*^{*} the existing intensive farming *land*[^] uses must be managed by consent conditions to ensure:

- (i) Good management practices to minimise the loss of nitrogen, phosphorus, faecal contamination and sediment are implemented.
 - (ii) Any losses of nitrogen, which cannot be minimised, are remedied or mitigated, including by other works or environmental compensation. Mitigation works may include but are not limited to, creation of wetland and riparian planted zones.
- (d) Ensure that cattle are excluded from surface water in accordance with Policy 14-5 (f) and (g) except where landscape or geographical constraints make stock exclusion impractical and the effects of cattle stock movements are avoided, remedied or mitigated. In all cases any unavoidable losses of nitrogen, phosphorus, faecal contamination and sediment are remedied or mitigated by other works.

7.26 As noted above, the consent triggered by Rule 14-2 is a Restricted Discretionary activity and the Plan outlines the matters which Horizons has restricted its discretion to. Acknowledging that Rule 14-2 is for any activity not complying with Rule 14-1, which is not limited to nitrogen leaching, the matters for discretion specifically include consideration of the 'extent of non-compliance with the nitrogen leaching maximums in Table 14.2' (Rule 14-2(b)).

7.27 In considering the matters by which Horizons will limit its discretion, a processing planner will refer back to the environment outcomes (objectives) and management direction (policies) of the Plan. In that regard, Policy 14-5 provides clear direction on circumstances in which land use activities (for their effect on surface and groundwater) must be managed in a particular way and Policy 14-6 provides very limited circumstances in which exceptions may be made.

7.28 Turning to the specific exceptions in Policy 14-6:

- (a) Subclause (b) states that an exception to (a) may be made for existing intensive farming land uses in the following circumstances:
 - (i) where the existing intensive farming *land*[^] use occurs on land that has 50% or higher of LUC Classes IV to VIII and has an average annual rainfall of 1500 mm or greater; or
 - (ii) where the existing intensive farming *land*[^] use cannot meet year 1 *cumulative nitrogen leaching maximums*^{*} in year 1, they shall be managed through conditions on their resource consent to ensure year 1 *cumulative nitrogen leaching maximums*^{*} are met within 4 years.
- (b) Subclause (c) identifies how uses must be managed where an exception is made; and
- (c) Subclause (d) imposes what is effectively a standard regarding the exclusion of cattle in terms of Policy 14-5(f) and (g), subject to exceptions.

7.29 From our review of Policy 14-6(b), we understand that there are specific environmental circumstances created by subclause (b)(i) and time expired conditions of subclause (b)(ii) that themselves do not provide an exception that would allow for 'most farms' to be captured by the combination of rule 14.2 and these specific exceptions (in other words, there is an inconsistency in the environmental outcomes sought by Policy 5-8 of the RPS and the conditions set by Table 14-2 and Policies 14-5 and 14-6).

7.30 On this basis, it is our view that the management direction of Policy 14-6 significantly limits the circumstances in which an exception to meeting the modelled nitrogen leaching limits can be considered. In particular, this limitation is created as the policies are specific to OVERSEER modelled results, rather than management (and resulting environmental outcomes) being expected from the implementation of management responses, even though the matters for discretion imply that this might be considered (for example subclause (c) "*measures to avoid, remedy or mitigate nutrient leaching...*"). Furthermore, while rule 14.2 provides scope on the matters by which a decision maker may 'limit its discretion' this Policy

does not provide direction to a decision maker to consider the extent to which these matters may be considered either appropriate (and consent granted) or in the converse, unsustainable (with consequential decline in consent).

- 7.31 Therefore, taking an approach that assumes there is a potential gap or inconsistency between the policies and the environmental outcomes sought in the Plan, we consider it would be appropriate to broaden consideration to wider management direction (policies) and outcomes (objectives) of the Regional Plan and RPS. In our view, this is particularly relevant when considering that as a Restricted Discretionary activity, 'regard is to be had' to the relevant objectives and policies (rather than a more stringent hurdle of 'giving effect' to these provisions).
- 7.32 By virtue of the structure of the above Policies (particularly Policy 14-5), we consider that there is some scope to rely on management direction provided from specific objectives and policies of the RPS (in the first instance to Policies 5-7 and 5-8 and through that to others). In particular, specific reference in Policy 14-5 is in order 'to give effect to the Policies 5-7 and 5-8' (albeit that these policies only provide direction in establishing the management framework of the Regional Plan). Policies 5-7 and 5-8 themselves also state the management direction is to develop strategies to give effect to Policies 5-2, 5-3, 5-4, 5-5 and 5-6 and these in turn refer to the management values and objectives for surface water (Schedule B of the RPS). In our view, it is this linking that provides scope for consideration of the extent to which a proposal can achieve wider management directives to 'maintain' and 'enhance' surface water quality and groundwater quality. Furthermore, we consider that there may be scope in the structure of these Policies (particularly in 'giving effect to' Policy 5-8), to provide for "appropriate timeframes for achievement where large changes to management practices or high levels of investment are required to achieve leaching maximums specified" in the consideration of matters for discretion. It is acknowledged that this approach could be subject to challenge, as it requires the policy direction to be built through reference to other policies (i.e.: a process to read the policies in the round) and that there are inconsistencies or even 'gaps' between the provisions of the Regional Plan and the directives of higher order documents, including the RPS.
- 7.33 Given the narrow scope of the provisions of the Regional Plan we consider there are only limited (and potentially not practicable) circumstances where such a consenting pathway may exist. It is important to note that this assessment is not intended to assume that a consenting pathway will 'enable a consent' in all cases, but rather the assessment has focused on what information would be relied on to make a consent decision. The identified circumstances are:
- (a) *In cases where the proposed leachate discharges will make no material change to the surface water and groundwater quality outcomes, by virtue of the scale of either the specific farm operation, the scale of wider land use activities, other discharges or other specific characteristics and values of a catchment:* However, it is acknowledged that such an approach is likely (without good catchment wide data) to require significant farm investment to support consideration in a consent application / decision making process. It is our understanding (from document review and through discussions with parties in the preparation of this advice) that such a consenting pathway is generally not considered reasonable or practicable for individual landowners, particularly without catchment-wide data / information available.
 - (b) *In cases where the modelling indicates that farm land use management is resulting in nitrogen leaching maximums that reduce over time, particularly if there is evidence that the Table 14.2 maximums will be achieved in the future:* In this case, the evidential hurdle would rely on information to demonstrate sufficiently that this is both an appropriate timeframe for achievement of these limits and that this is appropriate in terms of the scale of changes that are proposed to management practices (to progressively achieve the limits), or that an alternative programme and level of investment required to achieve the nitrogen leaching maximums is not practicable.

Again, no specific assessment has been undertaken of the information requirements needed to establish these matters (and as such whether or not such a consenting pathway is “practicable”).

- 7.34 In reaching the above conclusions, we reiterate that there are potential risks and challenges in this planning approach, particularly as Policy 5-8 refers to the process of ‘establishing targets’ in the Plan, rather than explicitly mentioning the implementation of the rules once those targets are established. As such, the process of ‘reaching back’ to such policy directives, relies on establishing an inconsistency or incompleteness between the policies and the environmental outcomes being sought.
- 7.35 Overall, it is our view that the policies related to management of intensive farming in the Plan (particularly Policies 14-5 and 14-6) sit apart from previous objectives and policies in both the RPS and Regional Plan, and indeed the apparent rule regime of the Regional Plan. This is because they do not seem to anticipate that applications can be made which do not comply with the maximums in Table 14.2, and do not provide the management direction on the environmental outcomes that are anticipated by the setting of the leachate maximums.
- 7.36 While non-compliance with the maximums in Table 14.2 is not denoted as a Prohibited activity in the rules, and clearly the rule framework of the Regional Plan provides a lawful consenting pathway for applications for consent to be sought for such activities, the policy direction for management in these policies sets little scope for the consideration of such activities or for the specific land use management practices that may be considered appropriate to provide for the ‘exception’ that is permitted by the rule structure.
- 7.37 The critical case therefore arises where an intensive farming land use cannot meet the maximums in Table 14.2 and does not qualify under the circumstances identified in Policy 14-6. The authors’ opinion is that in such cases, such activities can be consented only if the application can establish an evidential basis for the specific circumstances where this may apply. Further consideration of the practicality of providing this evidential basis lead us to conclude that in the case of the three scenarios tested, there appears to be little likelihood of a consent being able to be granted (on the basis of practicable information that may be able to be supplied by an applicant and acknowledging such an applicant is likely to be a sole farm / horticulture operation) in either Scenario 1A or 2. We do consider there is potential (albeit limited) scope in the case of Scenario 1B, but acknowledge there are risks with this approach.

8. **Conclusions**

- 8.1 In our view, the Regional Plan policies appear to significantly limit the circumstances by which an exception to meeting the modelled nitrogen leaching limits can be approved through a consent. There are only limited (and potentially not practicable) circumstances where such a consenting pathway may exist.
- 8.2 The apparent rule and policy regime of the Regional Plan does not seem to anticipate that applications can be made which do not “comply” with the maximums in Table 14.2 given the language that has been used. That is, while non-compliance with the maximums in Table 14.2 is not denoted as a Prohibited activity in the rules, and clearly the rule framework of the Regional Plan provides a lawful consenting pathway for applications for consent to be sought for such activities, the policy direction for management in these policies sets little scope for the consideration of such activities or for the specific land use management practices that may be considered appropriate to provide for the ‘exception’ that is permitted by the rule structure.
- 8.3 With respect to a way forward, the authors consider that in addition to any update of the OVERSEER table, amendments are required to Regional Plan Policies 14-5 and 14-6, as arguably these policies do not give effect to the higher order RPS Policy 5-8 which requires

that the nitrogen leaching maximums (and by parity of reasoning, any attendant rule framework) are achievable on 'most farms', and that appropriate timeframes for achievement should be provided where there would be large changes to management practices and/or high levels of investment for such activities in order to achieve the nitrogen leaching maximums.

- 8.4 In summary, such an amendment would lead to greater consistency in approach between the RPS and Regional Plan in the management of water quality of lakes and rivers in the Region. This approach is likely to result in environmental outcomes sought in the RPS being delivered over a more extended timeframe, but will allow existing activities to transition to better management practices for managing nitrogen leaching that meets the maximums, or where that is not possible even over the long term, transition to other land uses. Under this course, however, there would be some existing activities that would still not be capable of obtaining consent, but this is in line with RPS Policy 5-8 which anticipates that most (but not all) existing farms be able to achieve the nitrogen leaching maximums.

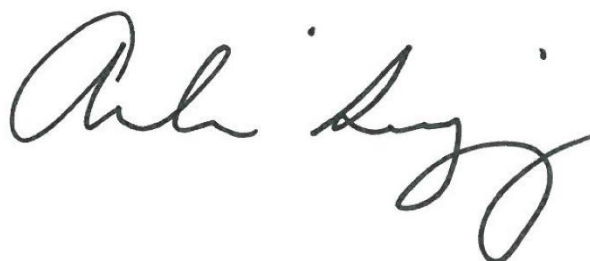
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APPENDIX B - Case Scenarios and Summary Planning Response

Question 1:

Is there a practical consenting pathway for intensive land uses under rules 14.2 and 14.4 of the Horizons One Plan that do not meet the cumulative nitrogen leaching maximum (CNLM) values in Table 14.2 and that do not fall under the exceptions detailed in Policy 14-6?

By “practical consenting pathway” we mean a consenting pathway that is realistic and achievable based on the case studies set out in Question 4 below. We would prefer the analysis for this section does not rely only on “theoretical” outcomes. By “theoretical” we mean outcomes that might be possible if many pre-conditions existed on farms and those pre-conditions do not reflect the current situation of farms in the area.

If your answer to this question is yes, what is that pathway? If it is no, please also explain your reasoning.

Response to Question 1:

On the basis that a practical consenting pathway means that individual farms or intensive land uses will not be required to undertake or provide catchment wide modelling or measurement, we do not consider that there is a practical consenting pathway for intensive land uses under Rules 14-2 and 14-4 of the Plan, particularly in Scenarios 1A or 2. There may be (subject to information on farm management practices), a pathway for Scenario 1B, but this relies on a reading of the policies of the Plan ‘in the round’, including a broad consideration of Policy 5-8 and the potential ‘gap’ or deficiency between that Policy and Table 14.2 of the Plan. This wider policy consideration is necessary to identify the management direction that might provide appropriate direction by which to assess this application.

While noting the limitations of Policies 14-5 and 14-6 (discussed above) even if a broader policy is considered appropriate, for other scenario applications, it is our view that in order to enable an adequate cumulative effects assessment to be undertaken, catchment-wide modelling would be required. We understand that Horizons have not commenced catchment / sub-catchment investigation that would enable more site specific assessment of the potential effects of any single farm nitrogen leachate contribution. As such it is considered that the information requirements to consider the effects of such an application (on a farm-by-farm basis) are potentially prohibitive and as such it is unlikely to be a practical consenting pathway for any individual intensive farming proposal.

Question 2:

Furthermore, please consider the following:

- a. Within the provisions of the plan, could a consent be granted for a short term if the CNLM values in Table 14.2 are not met?*
- b. Within the provisions of the plan, could a consent be granted for a long term if the CNLM values in Table 14.2 can be met in later years (i.e. Year 10 and Year 20 or Year 20 alone) but not in the preceding years (i.e. Year 1, Year 5 etc.)?*
- c. Notwithstanding the above, it has been indicated that in order to enable an adequate cumulative effects assessment to be undertaken, catchment-wide modelling would be required. To date Horizons have not commenced catchment wide models and given the potentially prohibitive cost of applicants undertaking modelling on an application by application basis, what impact does this have in terms of a practical consenting pathway being available?*

Response to Question 2:

Consideration has been given to the ‘timeframe’ factor and this has been determinative in the planning conclusions for Scenario 1B. A farm management practice change on a trajectory to

achieve the cumulative nitrogen leaching maximum (“**CNLM**”) values could be considered consistent with the provisions of the RPS and Plan (if ‘regard is had’ to these objectives and policies – rather than the need to ‘give effect’ to the policies). However, this approach relies on reading the objectives and policies of the Plan (and RPS) in the round, rather than the more limited direction provided by Policies 14-5 and 14-6, which do not provide for such consideration. For clarity, we do not consider that the ‘exception circumstances’ provided in Policy 14-6(b)(ii) provide a circumstance relevant to this Scenario.

While discussed further in the full scenario assessment, it is noted here that the exception circumstances set out in Policy 14-6(b) effectively provide to performance standard like conditions which are set as the exceptions that may be made to an exceedance of the nitrogen leaching maximums of Table 14-2. One of these relates to a physical environment condition, and the other to a time trajectory for compliance. It is our opinion that these circumstances would more appropriately be considered ‘performance standards’ to the rule, than policy directives, particularly as the first is a physical environment condition for the site (and will not be influenced by land use or resource management practices). In the case of the second subclause, it is our understanding that this condition is limited to four years from the date of Rule effect (in the case of dairy farming activities from August 2010 and for vegetable growing, cropping, and intensive beef and sheep farming from May 2013), both of which have passed.

Question 3:

If the answer to question 1 is no (i.e. there is no practical consenting pathway), please provide recommendations on how a consenting pathway could be provided for that is consistent with the broader One Plan.

Response to Question 3:

In respect of recommendations on how a consenting pathway could be provided for that is consistent with the Plan, we consider there are a number of approaches.

Broadly, it seems impractical to both set ‘consenting triggers on the basis of modelled information’ and then provide management direction strategies that solely relate to further modelled outcomes (rather than real environment strategies and outcomes). Therefore, on the basis that the approach is seeking to maintain the ‘majority’ of the RPS and Regional Plan provisions, and on our understanding that Council is considering a first step to amend Table 14-2, we consider that further amendment should be made to Policies 14-5 and 14-6 to provide clear management guidance by which to evaluate the appropriateness of an application against the ‘matters for discretion’ listed in Rule 14-2. We consider this would be the most effective approach to provide further direction on the specific management practices that could be considered appropriate in the assessment of the matters in a Restricted Discretionary activity (e.g.: what policy directions could be used to assess the matters for discretion).

On this basis, in addition to the amendments proposed to the OVERSEER model, we would suggest a way forward is for further amendments to Regional Plan Policies 14-5 and 14-6. Without intending to draft such policy amendments, we consider further policy guidance in the plan could be provided to assist processing planners on the following:

- (a) What might be included in an assessment of the ‘real world effects’ of an application for intensive farming activities, with reference to the strategies set in Policies of 5-2 through to 5-6 and the values and management objectives identified in Schedule 8 of the RPS;
- (b) Site specific considerations to assist to assess the appropriateness of the extent of non-compliance with the modelled nitrogen leaching maximums (e.g. given real world conditions);

- (c) The specific land use management practices that may be considered appropriate (e.g. what ‘good farm management practices’ look like) as measures to remedy and mitigate nutrient leaching;
- (d) The processes for changing farm management practices and systems to achieve an appropriate trajectory of improvements in nitrogen leaching maximums over time, acknowledging different intensive farm land use activities; and
- (e) The scope for consideration of other options, such as off-setting expected nitrogen leaching from an intensive farm operation with works or protection of other areas in the catchment, to achieve the strategies of the RPS and the values identified in Schedule 8 of the RPS.

It is noted that an alternative approach, to more fulsomely review the structure of the Plan provisions, such as a more comprehensive review of the methods to establish appropriate nitrogen leaching maximums across the Region’s catchments, in accordance with Policy 5-8 would be another approach to establishing an appropriate consenting pathway. This matter would require specific technical advice and is beyond the scope and expertise of the authors providing this opinion.

Question 4:

Please consider the following case studies and undertake an assessment of the scenario against the One Plan. The assessment should determine if a consenting pathway is available in each scenario and provide comment on the practicality of the relevant provisions of the One Plan (rules, policies and objectives) in identifying the consenting pathway (if available). It is important that the analysis focusses on what the practical outcomes are – not just theoretical (as detailed in Question 1 above):

For purposes of the current exercise, assume that Proposed Plan Change 2 has occurred, updating the values in Table 14.2 to bring them into line with Overseer 6.3.0.

Assume also the catchment in question to be over-allocated: while the One Plan does not explicitly include nutrient allocation limits, the logic of target catchments (and regulation of existing land uses) is that an excess of nutrients from agriculture is impacting on environmental outcomes in those areas. Note, however, that the reality is a little more complex: a further stage of this work might consider scenarios—particularly for dairy—where allocation status within a target catchment is questionable.

Scenario 1A: Dairy above the table

Total farm size: 116 ha, comprising 45 ha LUC 2; 25 ha LUC 3; 46ha LUC 4

Rainfall: 1190mm/yr

Current leaching: 60 kg/N/ha/yr

Cumulative Nitrogen Leaching Targets (Assuming table 14.2 has been updated to Overseer 6.3.0):

Yr 1	Yr 5	Yr 10	Yr 20
38	35	32	28

Additional good management practices (GMP) have been identified to reduce Nitrogen leaching. Once all applicable GMP are implemented, the farm’s estimated N losses (from Overseer) are:

Yr 1	Yr 5	Yr 10	Yr 20

N/A	55	52	50
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Assume all matters of discretion, other than target leaching rates, are or will be met.

Scenario 1B: Dairy ‘on a trajectory to meet’ the table

Total farm size: 116 ha, comprising 45 ha LUC 2; 25 ha LUC 3; 46ha LUC 4

Rainfall: 1190mm/yr

Current leaching: 60 kg/N/ha/yr

Cumulative Nitrogen Leaching Targets (Assuming table 14.2 has been updated to Overseer 6.3.0):

Yr 1	Yr 5	Yr 10	Yr 20
38	35	32	28

By applying GMP and undertaking deeper farm-system change, the farm’s estimated N losses (from Overseer) are:

Yr 1	Yr 5	Yr 10	Yr 20
N/A	50	45	28

Assume all matters of discretion, other than target leaching rates, are or will be met.

Scenario 2: Horticulture

Total farm size: 105 ha, comprising 52.5 ha each of LUC 1 and LUC 2

Rainfall: 1102mm/yr

Intensive Vegetable Production Model

Cumulative Nitrogen Leaching Targets (Assuming table 14.2 has been updated to Overseer 6.3.0):

Yr 1	Yr 5	Yr 10	Yr 20
48	46	44	39

It is recognised that using Overseer to model N loss from horticulture is challenging. The property in this scenario does not have an Overseer basefile.

A report compiled by Stuart Ford estimates losses from horticulture systems typical of the Horowhenua as 61-69 kgs/N/ha/yr (modelled through Overseer). A fluxmeter trial, under intensive cropping near Levin, measured actual N loss at an average of 160 kg/N/ha/yr over the last 4 years.

The operation is currently applying some GMP, mostly to do with cultivation management. There is room for improvement with N fertiliser management, soil testing, and record keeping. However, work by Stuart Ford looking at horticulture mitigations indicates that even with all GMP implemented, the operation would not be able to significantly reduce the gap between estimated N leaching and the Table.

All other matters of discretion are met.

Response to Question 4 (followed by Scenario Assessment):

Can consent be sought for a discharge in 'intensive farming' where the modelled nitrogen leaching maximum exceeds the values in Table 14.2?

Yes, consent can be sought as a Restricted Discretionary activity. The matters over which discretion is limited are set out in the Rule 14-2. However, as discussed in the opinion, it is the regard to objectives and policies (and particularly Policies 14-5 and 14-6) which constrain the ability for a planner to consider the potential environmental effects and environmental outcomes of such an application.

In the case of Rule 14-2, the following objectives and policies are considered relevant:

- Objectives: RPS Objectives 2-1, 5-1, 5-2, 6-2 & Regional Plan Objective 14-1; and
- Policies: RPS Policies 5-1, 5-7, 5-8, Regional Plan Policies 14-1, 14-2, 14-5, 14-6, 4-9.

The consideration of the ability to achieve the outcomes of these objectives and to manage land use in a manner consistent with the policies is set out below in the assessment of Scenarios 1A, 1B, and 2.

The key issue in all cases is specifically with Policy 14-6 and the way that Policy has been worded. Policy 14-6 creates an apparent binary policy parameter for 'exceptions' to needing to meet the nitrogen leaching maximums.

This is complex from an interpretive perspective as Policy 14-6 is structured in a manner which indicates that a decision maker can only consider non-compliance in particular circumstances (and these circumstances are more appropriately worded as performance standards to a rule than as policy directives), which are defined by the exceptions in Policy 14-6(b). However, this Policy is not the rule and the rule establishes specific matters that consideration will be given to, which in turn should be used to determine whether or not consent can be granted.

In that regard, the exceptions of Policy 14-6 are 'exclusive' (e.g.: they are the conditions that must apply), and there no scope for other conditions. However, the provisions of the matters for discretion are broad and establish an inconsistency. It is further noted that Policies 14-5 and 14-6 are explicitly identified to achieve Policies 5-7 and 5-8 and therefore the argument of 'achievable on most farms' and providing for 'an appropriate timeframe for compliance' may be considerations that can be factored in, particularly on the basis that an inconsistency or gap is identified in the policy framework to the environmental outcomes set by the Plan and higher order RPS. In other words, while not consistent with Policies 14-5 and 14-6, a planner reviewing a consent application and making a decision need to read the policies (including relevant RPS policies) in the round.

A more fulsome summary of the planning scenario analysis is provided in **Attachment C**.

APPENDIX C – Analysis of Consenting Pathways for Scenarios 1A, 1B and 2

Scenario Analysis

Scenarios 1A, 1B and 2, as outlined in Appendix One of the Request for Independent Planning Advice on the Manawatu-Whanganui Regional Council One Plan (“**the Plan**”), have been assessed with reference to the following questions:

- Is a consenting pathway available for each scenario using PPC2?;
- Provide commentary on the practicality of the relevant provisions (rules, policies, objectives) in the consenting pathway; and
- Provide the above with a focus on the practical outcomes, in addition to theoretical outcome conclusions.

Each scenario assumes the allocation status within each target catchment is over-allocated (e.g.: nutrient allocation limits, target catchments and regulation of existing land uses). No allowance is made in each scenario for reviewing or varying the land use capability (“**LUC**”) classes across each farm (e.g. it is assumed that the LUC classes defined are accurate).

In the context of the scenarios, no specific consideration is given to the ‘practicability’ of changes to farm management practices which may amend the outcomes of Table 14.2. Provision of information confirming the current nitrogen leaching rates at a catchment level has not generally been considered an economically practicable approach for a landowner to undertake (e.g. as information for a specific resource consent application).

Effects of non-compliance with Table 14.2 are understood to be environmental effects, specifically relating to water quality. Given the difficulty in measuring water quality effects that can be directly attributed to one farm (where effects are more likely to be from multiple sources within a catchment), it may not be economically practicable for a landowner to undertake specific assessment for each application.

For this reason, the following assessment is based on the information provided in the scenarios and has not assumed that such effects based evidential information is available (which may make consideration of the potential effects of the application simpler in consenting process).

Scenario Assumptions / Limitations

- The scope of the work requested is a planning assessment, it is not a technical expert opinion nor an ecological assessment in terms of nitrogen management and effects;
- The discharge of nitrogen has been assumed not to be a point source discharge and no assessment of point source discharges has been made;
- No feedback has been made on the practicality of Policy 14-3 Industry-based standards;
- An assumption has been made for all scenarios that they are intensive farming land uses (pursuant to Policy 14-5); and
- Table 14.2 referenced below uses the numbers provided in the scenarios from MfE (not those currently in the Plan, nor on the Plan PPC2 factsheet).

Scenario Assessment Summary

Scenario 1A (‘above the table’) proposed good management practices to reduce nitrogen losses. The practices will reduce nitrogen losses somewhat, however they did not significantly close the gap across the 20 year time period between estimated losses, and the Table 14.2 nitrogen leaching targets. As a result, in all time horizons, the model nitrogen leaching maximum values exceeded the thresholds set in Table 14.2.

Scenario 1B (‘Dairy on a trajectory to meet the table’) proposed good management practices to reduce nitrogen losses. The practices will reduce nitrogen over the 20 year time period to a point where the modelling indicates that the nitrogen leaching maximum values will meet the Table 14.2 nitrogen leaching targets in the 20th year.

Scenario 2 ('Horticulture') is estimated to currently have nitrogen loss of 61-160kgs of nitrogen per hectare per year. This estimate is not based on results from the subject site, but rather from similar land use sites in the Region. There is no information provided with the scenario which demonstrates future compliance with the Table 14.2 targets.

Objectives: RPS Objectives 2-1, 5-1, 5-2, 6-2 & Regional Plan Objective 14-1

Adverse effects, including cumulative adverse effects, on the natural character of wetlands, rivers and lakes are required to be avoided, remedied or mitigated (Objective 6-2(b)). The mauri of water is required to be given regard to (Objective 2-1) to enable hapū and iwi to provide for their social, economic and cultural wellbeing.

Regional Plan Rule 14-2 implies that non-compliance with Table 14.2 will have nitrogen leaching effects (acknowledging this is a modelled trigger only). Issues 5-1 and 5-2 of the Regional Policy Statement ("RPS") identify water quantity and allocation as an issue for the Region with one of the causes of water quality degradation being nutrient enrichment caused by leaching from agricultural land. Objective 5-1 requires surface water bodies to be managed in a manner which safe guards their life supporting capacity. Objective 5-2 requires water quality to be maintained to achieve levels sufficient to support the values of Schedule B.

Nitrogen leaches into waterways and therefore has the potential to result in accelerated eutrophication, providing conditions for excessive aquatic weed growth and thereby suffocating waterways and changing the lifestyle of the aquatic food chain.

On the basis of non-compliance with Table 14.2, we can (without evidence to the contrary) assume adverse effects to be created by Farm 1A and Horticulture Site 2; these sites do not propose measures to sufficiently manage anticipated water quality effects and achieve the direction of Objective 5-2. Whilst the proposed practices by Farm 1A and Horticulture Site 2 seek to reduce nitrogen losses, the ongoing impact of nitrogen in the waterway at the loss rate estimated will reduce water quality to a degree that continues to exceed Table 14.2. The comparatively low rate of change in nitrogen leaching from Farms 1A and 2, as modelled, and as provided in the scenario application, is generally not supported by the policy provision requirements as the degradation of water quality at a rate not anticipated by the Regional Plan does not avoid, remedy or mitigate effects to achieve Objectives 5-2 and 14-1.

Policies RPS 5-1, 5-7, 5-8, Regional Plan 14-1, 14-2, 14-5, 14-6, 4-9

The policy framework requires management of waterways to safeguard their life supporting capacity and consent decisions to avoid, remedy or mitigate related adverse effects (Policy 5-1) and provides water quality targets to inform surface water quality management or enhancement

The proposed nitrogen discharge from Farm 1A and Horticulture Site 2 exceeds the Regional Plan targets for the leaching of nitrogen for the existing intensive farming land use (Policy 14-5), and therefore is assumed to have anticipated adverse effects on waterways. The policies relating to management are relevant to these sites. On Farm 1B, the targets of the Plan are met over time and on this basis, it is considered that a case may be made, pursuant to the policies and the RPS for such effects on the water to be considered 'acceptable' or there is a pathway to achieve consent. It is important to note that the information that may be required to assess the appropriateness of this regime in the context of the scenarios is not available. Rather, this assessment concludes that in the 'order of probability' there may be scope to present information that demonstrates that ongoing management and implementation of land use management changes are such that surface water quality and groundwater quality is being enhanced (over time) in a manner considered appropriate to achieve the leachate maximum targets.

Intensive farming land use activities have been identified as activities that make a significant contribution to elevated contaminant levels and the management of land use is therefore set out in Policy 5-7. Based on the scenario information provided (and without further specific effects

assessment or site specific detail) it is considered reasonable to assume that the proposed discharge from Farm 1A and Horticulture Site 2 would have potential to adversely affect water quality. The nitrogen leaching maximum on these sites is projected to consistently not achieve the Plan targets which have been set in relation to the capability of the land to filter nitrogen on a catchment basis and reduce effects on sensitive receiving environments (Policy 14-2). The good management practices proposed on Farm 1A and Horticulture Site 2 have been determined to be insufficient to decrease nitrogen losses to achieve the outcomes sought by the Plan within an appropriate timeframe (Policies 5-8, 14-5). The Plan exceptions do not provide Farm 1A or Horticulture Site 2 with exceptions to compliance (Policy 14-6).

Policy 5-8(a)(i)(D) and (E) suggest that consenting of dairy and horticulture activities which do not meet the standards, but which are working towards improved management practices which will (over time) result in achieving these standards, are anticipated (albeit this is specifically in reference to the 'setting of targets' – which is reflected in Table 14.2 of the Plan).

Results of the OVERSEER model indicate that Farm 1B will gradually reduce nitrogen losses from the site. Subject to further information (not provided in the scenario test) it is considered this may reflect a staged trajectory of changes to farm management practice toward compliance. Given the policy and maximums of Table 14.2 it is considered that the gradual or staged reduction of leachate maximums could be to be appropriate as a practical approach and outcome for compliance. It is anticipated that further information (explaining this position), would be considered as matters for discretion, in accordance with the Rule 14-2. On the basis that the proposed good management practices by Farm 1B will reduce nitrogen losses to a degree supported by Policies 5-8 and 14-1(c) over time, there may be additional scope to consider this scenario (e.g.: in the order of probability there may be a way to grant consent). It is noted that the 20 year compliance timeframe proposed does not appear to achieve the intent of Policy 14-6(b)(ii). Notwithstanding this, the appropriate 'regard' to this policy alongside other provisions of the Plan may enable this scenario to be considered 'consentable' without further catchment wide assessment and technical information.

Through assessment of the application for Farm 1A and Horticulture Site 2, one might seek to explore with the landowner other land use management responses (e.g. setting aside land for riparian planting / wetlands etc) to reduce the modelled figures in OVERSEER, but this is likely to have potential impacts on stock loading (or horticultural production) etc, and has not been considered further in the scenario testing.

Under Scenario 1B, approval of this application would likely need to be subject to vigorous conditions which require ongoing changes in the land use management with available evidential compliance measures to ensure that the nitrogen discharge is decreasing as projected. Development of such conditions would likely require technical input from relevant specialist advisors relating to ecology and farm management.

Final Conclusion

Farm 1A and Horticulture Site 2 requires consent pursuant to Rule 14-2 as an intensive farming land use which exceeds the cumulative nitrogen leaching maximums. Assessment against the relevant objectives and policies of the RPS and the Regional Plan have demonstrated that, without evidence to the contrary, the proposals will not be likely to be able to be practicably demonstrate how they will achieve the Plan's outcomes. On the basis of the above assessment, and without further information (which we have considered would be a robust demonstration of why the proposed nitrogen losses will not have adverse effects), and without significantly changing the land use to achieve the Plan targets (e.g.: reducing stock loading, planting or retiring vulnerable land, using feed pads, or other mechanisms), consent for Farm 1A and Horticulture Site 2 would likely be declined.

In contrast, and pursuant to the overall objectives and policies of the Plan, we consider there may be a scenario where the changing farm management practices of Farm 1B mean that there is sufficient site specific evidence to suggest that this is an appropriate and sustainable management response. In particular, this is based on the modelling information which indicates that farm

management practices are on a planned trajectory to achieve compliance with the leachate maximums set in the Plan over the longer term. It is anticipated that any consenting for this activity would likely rely on appropriate conditions of consent requiring that this planned trajectory of farm management change was implemented.

Scenario 1 A 'Dairy above the table'

Kgs of N per hectare per year	Year 1	Year 5	Year 10	Year 20
Table 14.2 Cumulative nitrogen leaching targets**	38	35	32	28
Proposed good management practice estimated N losses on Farm 1A**	N/A	55	52	50

Scenario 1 B 'Dairy on a trajectory to meet the table'

Kgs of N per hectare per year	Year 1	Year 5	Year 10	Year 20
Table 14.2 Cumulative nitrogen leaching targets**	38	35	32	28
Proposed good management practice and deeper farm-system change, estimated N losses on Farm 1B**	N/A	50	45	28

Scenario 2 'Horticulture'

Kgs of N per hectare per year	Current estimate	Year 1	Year 5	Year 10	Year 20
Table 14.2 Cumulative nitrogen leaching targets**		48	46	44	39
Current operation estimate N loss	61-160				

Relevant Objectives and Policies from the Horizons Regional Council One Plan

OnePlan Objective and Policies	
Objective 5-1: Water [^] management Values	Surface water bodies [^] and their beds [^] are managed in a manner which safe guards their life supporting capacity and recognises and provides for the Values in Schedule B1.
Objective 5-2: Water [^] quality	<p>Water[^] quality</p> <p>a) Surface water[^] quality is managed to ensure that:</p> <p>(i) water[^] quality is maintained in those rivers[^] and lakes[^] where the existing water[^] quality is at a level sufficient to support the Values in Schedule B</p> <p>(ii) water[^] quality is enhanced in those rivers[^] and lakes[^] where the existing water[^] quality is not at a level sufficient to support the Values in Schedule B</p> <p>(iii) accelerated eutrophication and sedimentation of lakes[^] in the Region is prevented or minimised</p> <p>(iv) the special values of rivers[^] protected by water conservation orders[^] are maintained.</p> <p>b) Groundwater quality is managed to ensure that existing groundwater quality is maintained or where it is</p>

OnePlan Objective and Policies	
	degraded/over allocated as a result of human activity, groundwater quality is enhanced.
Policy 5-1: Water Management Zones* and Values	<p>For the purposes of managing water[^] quality, water[^] quantity, and activities in the beds[^] of rivers[^] and lakes[^], the catchments in the Region have been divided into Water Management Zones* and Water Management Sub-zones* in Schedule A.2 Groundwater has been divided into Groundwater Management Zones* in Schedule D.3</p> <p>The rivers[^] and lakes[^] and their beds[^] must be managed in a manner which safeguards their life supporting capacity and recognises and provides for the Schedule B Values when decisions are made on avoiding, remedying or mitigating the adverse effects[^] of activities or in relation to any other function under the Resource Management Act 1991 exercised by the Regional Council or Territorial Authorities. The individual Values and their associated management objectives are set out in the Schedule B Surface Water[^] Management Values Key and repeated in Table 5.2</p>
Policy 5-2: Water quality targets*	In Schedule E4, <i>water quality targets*</i> relating to the Schedule B Values (repeated in Table 5.2) are identified for each <i>Water Management Sub-Zone*</i> . Other than where they are incorporated into <i>permitted activity[^]</i> rules as <i>conditions[^]</i> to be met, the <i>water quality targets*</i> in Schedule E must be used to inform the management of surface water [^] quality in the manner set out in Policies 5-3, 5-4 and 5-5.
Policy 5-4: Enhancement where water quality targets* are not met	<p>(a) Where the existing water[^] quality does not meet the relevant Schedule E water quality targets* within a Water Management Sub-zone*, water[^] quality within that sub-zone must be managed in a manner that enhances existing water[^] quality in order to meet:</p> <ul style="list-style-type: none"> (i) the water quality target* for the Water Management Zone* in Schedule E, and/or (ii) the relevant Schedule B Values and management objectives that the water quality target* is designed to safeguard. <p>(b) For the avoidance of doubt:</p> <ul style="list-style-type: none"> (i) in circumstances where the existing water[^] quality of a Water Management Sub-zone* does not meet all of the water quality targets* for the Sub-zone*, (a) applies to every water quality target* for the Sub-zone (ii) in circumstances where the existing water[^] quality of a Water Management Sub-zone* does not meet some of the water quality targets* for the Sub-zone*, (a) applies only to those water quality targets* not met.
Policy 5-5	<p>a) Where there is insufficient data to enable a comparison of the existing water[^] quality with the relevant Schedule E water quality targets*, water[^] quality within the Water Management Sub-Zone[^] must be managed in a manner which, beyond the zone of reasonable mixing (where reasonable mixing is applicable):</p> <ul style="list-style-type: none"> (i) maintains or enhances the existing water[^] quality

OnePlan Objective and Policies

	<ul style="list-style-type: none"> (ii) has regard to the likely effect of the activity on the relevant Schedule B Values that the water quality target* is designed to safeguard (iii) has regard to relevant information about the existing water^ quality in upstream or downstream Water Management Subzones*, where such information exists b) For the avoidance of doubt: <ul style="list-style-type: none"> (i) in circumstances where there is insufficient data to enable a comparison of the existing water^ quality with all of the water quality targets* for a Water Management Sub-zone*(a) applies to every water quality target* for the Sub-zone* (ii) in circumstances where there is insufficient data to enable a comparison of the existing water^ quality with some of the water quality targets* for a Water Management Sub-zone* (a) applies only to those water quality targets* with insufficient data (iii) for the purpose of (a) reasonable mixing is only applicable to a discharge^ from an identifiable location.
<p>Policy 5-7: Land^ use activities affecting groundwater and surface water^ quality</p>	<p>The management of land^ use activities affecting groundwater and surface water^ must give effect to the strategy for surface water^ quality set out in Policies 5-2, 5-3, 5-4 and 5-5, and the strategy for groundwater quality in Policy 5-6, by managing diffuse discharges^ of contaminants in the following manner:</p> <ul style="list-style-type: none"> a) identifying in the regional plan targeted Water Management Sub-zones*. Targeted Water Management Sub-zones* are those subzones where, collectively, land^ use activities are significant contributors to elevated contaminant levels in groundwater or surface water^ b) identifying in the regional plan intensive farming land^ use activities. Intensive farming land^ use activities are rural land^ use activities that (either individually or collectively) make a significant contribution to elevated contaminant levels in the targeted Water Management Subzones* identified in (a) above c) actively managing the intensive farming land^ use activities identified in (b) including through regulation in the regional plan, in the manner specified in Policy 5-8
<p>Policy 5-8: Regulation of intensive farming land^ use activities affecting groundwater and surface water^ quality</p>	<ul style="list-style-type: none"> a) Nutrients <ul style="list-style-type: none"> (i) Nitrogen leaching maximums must be established in the regional plan which: <ul style="list-style-type: none"> (A) take into account all the non-point sources of nitrogen in the catchment (B) will achieve the strategies for surface water^ quality set out in Policies 5-2, 5-3, 5-4 and 5-5, and the strategy for groundwater quality in Policy 5-6 (C) recognise the productive capability of land^ in the <i>Water Management Sub-zone*</i> (D) are achievable on most farms using good management practices

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	<p>(E) provide for appropriate timeframes for achievement where large changes to management practices or high levels of investment are required to achieve the nitrogen leaching maximums.</p> <p>(ii) Existing intensive farming land[^] use activities must be regulated in targeted Water Management Sub-zones* to achieve the nitrogen leaching maximums specified in (i).</p> <p>(iii) New intensive farming land[^] use activities must be regulated throughout the Region to achieve the nitrogen leaching maximums specified in (i).</p>
Objective 14-1: Management of discharges [^] to land [^] and water [^] and land [^] uses affecting groundwater and surface water quality	<p>The management of discharges[^] onto or into land[^] (including those that enter water[^]) or directly into water[^] and land[^] use activities affecting groundwater and surface water[^] quality in a manner that:</p> <ol style="list-style-type: none"> a) safeguards the life supporting capacity of water and recognises and provides for the Values and management objectives in Schedule B, b) provides for the objectives and policies of Chapter 5 as they relate to surface water[^] and groundwater quality, and c) where a discharge[^] is onto or into land[^], avoids, remedies or mitigates adverse effects[^] on surface water[^] or groundwater
Policy 14-1: Consent decision-making for discharges [^] to water [^]	<p>When making decisions on resource consent[^] applications, and setting consent conditions[^], for discharges[^] of water[^] or contaminants[^] into water[^], the Regional Council must specifically consider:</p> <ol style="list-style-type: none"> a) the objectives and Policies 5-1 to 5-5 and 5-9 of Chapter 5, and have regard to: b) avoiding discharges[^] which contain any persistent contaminants[^] that are likely to accumulate in a water body[^] or its bed[^], c) the appropriateness of adopting the best practicable option[^] to prevent or minimise adverse effects[^] in circumstances where: <ol style="list-style-type: none"> (i) it is difficult to establish discharge[^] parameters for a particular discharge[^] that give effect to the management approaches for water[^] quality and discharges[^] set out in Chapter 5, or (ii) the potential adverse effects[^] are likely to be minor, and the costs associated with adopting the best practicable option[^] are small in comparison to the costs of investigating the likely effects[^] on land[^] and water[^], and d) the objectives and policies of Chapters 2, 3, 6, 9 and 12 to the extent that they are relevant to the discharge[^].
Policy 14-2: Consent decision-making for discharges [^] to land	<p>When making decisions on resource consent[^] applications, and setting consent conditions[^], for discharges[^] of water[^] or contaminants[^] into water[^], the Regional Council must have regard to:</p> <ol style="list-style-type: none"> a) the objectives and policies of Chapter 5 regarding the management of groundwater quality and discharges[^],

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	<ul style="list-style-type: none"> b) where the discharge[^] may enter surface water[^] or have an adverse effect[^] on surface water[^] quality, the degree of compliance with the approach for managing surface water[^] quality set out in Chapter 5, c) avoiding as far as reasonably practicable any adverse effects[^] on any sensitive receiving environment[^] or potentially incompatible land[^] uses, in particular any residential buildings, educational facilities, churches, marae, public areas, infrastructure[^] and other physical resources of regional or national importance identified in Policy 3-1, wetlands[^], surface water bodies[^] and the coastal marine area[^], d) the appropriateness of adopting the best practicable option[^] to prevent or minimise adverse effects[^] in circumstances where: <ul style="list-style-type: none"> (i) it is difficult to establish discharge[^] parameters for a particular discharge[^] that give effect to the management approaches for water[^] quality and discharges[^] set out in Chapter 5, (ii) the potential adverse effects[^] are likely to be minor, and the costs associated with adopting the best practicable option[^] are small in comparison to the costs of investigating the likely effects[^] on land[^] and water[^], e) avoiding discharges[^] which contain any persistent contaminants[^] that are likely to accumulate in the soil or groundwater, and f) the objectives and policies of Chapters 2, 3, 6, 9 and 12 to the extent that they are relevant to the discharge[^].
<p>Policy 14-5: Management of intensive farming land[^] uses</p>	<p>In order to give effect to Policy 5-7 and Policy 5-8, intensive farming land[^] use activities affecting groundwater and surface water[^] quality must be managed in the following manner:</p> <ul style="list-style-type: none"> a) The following land uses have been identified as intensive farming land[^] uses: <ul style="list-style-type: none"> (i) Dairy farming* (ii) Commercial vegetable growing* (iii) Cropping* (iv) Intensive sheep and beef* b) The intensive farming land[^] uses identified in (a) must be regulated where: <ul style="list-style-type: none"> (i) They are existing intensive farming land[^] uses, in the targeted Water Management Sub-zones* identified in Table 14.1. (ii) They are new (ie., established after the Plan has legal effect¹) intensive farming land[^] uses, in all Water Management Subzones* in the Region. c) Nitrogen leaching maximums have been established in Table 14.2. d) Existing intensive farming land[^] uses regulated in accordance with (b)(i) must be managed to ensure that the leaching of nitrogen from those land[^] uses does not exceed the cumulative nitrogen leaching

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	<p>maximum* values for each year contained in Table 14.2, unless the circumstances in Policy 14-6 apply.</p> <p>e) New intensive farming land^ uses regulated in accordance with (b)(ii) must be managed to ensure that the leaching of nitrogen from those land^ uses does not exceed the cumulative nitrogen leaching maximum* values for each year contained in Table 14.2.</p> <p>f) Intensive farming land^ uses regulated in accordance with (b) must exclude cattle from:</p> <p>(i) A wetland^ or lake^ that is a rare habitat*, threatened habitat* or at-risk habitat*.</p> <p>(ii) Any river^ that is permanently flowing or has an active bed* width greater than 1 metre.</p> <p>g) All places where cattle cross a river that is permanently flowing or has an active bed* width greater than 1 metre must be culverted or bridged and those culverts or bridges must be used by cattle whenever they cross the river.</p>
<p>Policy 14-6: Resource consent decision-making for intensive farming land^ uses</p>	<p>When making decisions on resource consent^ applications, and setting consent conditions^, for intensive farming land^ uses the Regional Council must:</p> <p>a) Ensure the nitrogen leaching from the land is managed in accordance with Policy 14-5.</p> <p>b) An exception may be made to (a) for existing intensive farming land^ uses in the following circumstances:</p> <p>(i) where the existing intensive farming land^ use occurs on land that has 50% or higher of LUC Classes IV to VIII and has an average annual rainfall of 1500 mm or greater; or</p> <p>(ii) where the existing intensive farming land^ use cannot meet year 1 cumulative nitrogen leaching maximums* in year 1, they shall be managed through conditions on their resource consent to ensure year 1 cumulative nitrogen leaching maximums* are met within 4 years.</p> <p>c) Where an exception is made to the cumulative nitrogen leaching maximum* the existing intensive farming land^ uses must be managed by consent conditions to ensure:</p> <p>(i) Good management practices to minimise the loss of nitrogen, phosphorus, faecal contamination and sediment are implemented.</p> <p>(ii) Any losses of nitrogen, which cannot be minimised, are remedied or mitigated, including by other works or environmental compensation. Mitigation works may include but are not limited to, creation of wetland and riparian planted zones.</p> <p>d) Ensure that cattle are excluded from surface water in accordance with Policy 14-5 (f) and (g) except where landscape or geographical constraints make stock exclusion impractical and the effects of cattle stock movements are avoided, remedied or mitigated. In all cases any unavoidable losses of nitrogen, phosphorus,</p>

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	faecal contamination and sediment are remedied or mitigated by other works or environmental compensation. Mitigation works may include (but are not limited to) creation of wetland and riparian planted zones.
Policy 14-9: Consent decision making requirements from the National Policy Statement for Freshwater Management	<p>a) This policy applies to any application for the following discharges[^] (including a diffuse discharge[^] by any person or animal):</p> <ul style="list-style-type: none">(i) a new discharge[^]; or(ii) a change or increase in any discharge[^] – of any contaminant[^] into fresh water[^], or onto or into land[^] in circumstances that may result in that contaminant[^] (or, as a result of any natural process from the discharge[^] of that contaminant[^], any other contaminant[^]) entering fresh water[^] <p>b) When considering any application for a discharge[^] the Regional Council must have regard to the following matters:</p> <ul style="list-style-type: none">(i) the extent to which the discharge[^] would avoid contamination that will have an adverse effect on the life-supporting capacity of fresh water[^] including on any ecosystem associated with fresh water[^]; and(ii) the extent to which it is feasible and dependable that any more than minor adverse effect on fresh water[^], and on any ecosystem associated with fresh water[^], resulting from the discharge[^] would be avoided. This clause of the policy does not apply to any application for consent first lodged before the National Policy Statement for Freshwater Management 2011 took effect on 1 July 2011. <p>c) When considering any application for a discharge[^] the Regional Council must have regard to the following matters:</p> <ul style="list-style-type: none">(i) the extent to which the discharge[^] would avoid contamination that will have an adverse effect on the health of people and communities as affected by their secondary contact with fresh water[^]; and(ii) the extent to which it is feasible and dependable that any more than minor adverse effect on the health of people and communities as affected by their secondary contact with fresh water[^] resulting from the discharge[^] would be avoided. <p>This clause of the policy does not apply to any application for consent first lodged before the National Policy Statement for Freshwater Management 2014 took effect on 4 July 2014</p>